In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 992

DANIEL L. GINSBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In March 1957 the Commissioner of Internal Revenue served a notice of deficiency in income taxes upon Nash Miami Motors, Inc., which timely filed in the Tax Court a petition to redetermine the asserted deficiency (Pet. 2-3, n. 1).

While the Tax Court proceeding was pending, the petitioner, acting as a stockholder and director, filed in January 1964 in a State court in Florida a complaint seeking the dissolution of the corporation (R.

1-2).[1] On the next day the State court ordered dissolution and appointed a trustee to liquidate the business (R. 3-4).

Pursuant to Section 6871 of the Internal Revenue Code of 1954 (Pet. App. 5-6), which directs the immediate assessment of any deficiency in taxes upon "the appointment of a receiver for any taxpayer in any receivership proceeding before any court of * * * any State," the District Director of Internal Revenue assessed against the corporation the taxes as to which he had asserted a deficiency in 1957 (Pet. 2). A few days thereafter, in the latter part of January, the government filed in the State court proceeding a proof of claim for those taxes (Pet. 2; R. 5).

Ten months later, in November 1964, the Tax Court sustained the deficiency (Pet. 3). The corporation filed a petition to review in the United States Court of Appeals for the Fifth Circuit, which affirmed in April 1966. *Nash Miami Motors, Inc.* v. *Commissioner*, 358 F. 2d 636, certiorari denied, 385 U.S. 918. While the case was pending before the Fifth Circuit, the Florida State Court in June 1965, on the basis of the Tax Court's decision, upheld the government's tax claim (which exceeded the corporation's assets); awarded that claim priority over claims of the other creditors; and directed the trustee, after paying expenses, to turn over the remaining assets to the United States (Pet. 3; Pet. App. 15-16). The Supreme Court of Florida affirmed *per curiam* (Pet. App. 13).

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[1] He alleged (R. 1-2) that its stock was equally divided between two groups which had irreconcilable differences over the conduct of the business; that the corporation had an even number of directors who were similarly divided; and that, unless the corporation were liquidated, the rights of its creditors would be seriously impaired.

The decision of the Supreme Court of Florida was correct, and there is no question warranting further review.

1. Petitioner contends (Pet. 6-11) that by assessing a deficiency and filing a tax claim in the State dissolution proceedings, the United States ousted the Tax Court of jurisdiction to determine the federal tax claim; and that since the Tax Court was thus without jurisdiction, the State court improperly relied upon that court's determination as a basis for sustaining the claim. Although Section 6871(b) (Pet. App. 6) of the Code authorizes the district director to litigate tax claims in State court proceedings, it does not require him to do so. It states only that "claims for the deficiency * * * *may be presented*, for adjudication in accordance with law, to the court before which the * * * receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court" (emphasis added); and it bars the filing in the Tax Court of any petition for redetermination after the appointment of a receiver. Nothing in Section 6871 indicates, or even suggests, however, that once the jurisdiction of the Tax Court has been properly invoked, the subsequent filing of a State court proceeding ousts that court of jurisdiction.[2] See

[2] There is nothing to the contrary in *Abel* v. *Campbell*, 334 F. 2d 339 (C.A. 5) and *Cohen* v. *Gross*, 316 F. 2d 521 (C.A. 3), upon which petitioner relies (Pet. 8-9). Both of those cases involved attempts by taxpayers to enjoin the collection of tax claims that had been allowed in bankruptcy; in neither case had a Tax Court suit been instituted prior to the bankruptcy proceeding. *Abel* held (334 F. 2d at 341-342) that the bar in Section 6871 against filing a Tax Court suit after the taxpayer has been adjudicated a bankrupt is not limited to that part of the tax claim that can be satisfied out of the bankrupt estate, but covers the entire claim that the Bankruptcy

Cunningham v. *Commissioner*, 20 B.T.A. 428; *Harris* v. *Commissioner*, 32 T.C. 1216. To the contrary, the statutory scheme is that where the Tax Court proceeding was filed before the institution of the State court receivership or liquidation action, the district director, although required to make an immediate assessment of the tax, has the option either to continue litigating before the Tax Court or to litigate the tax claim in the State court.

In the present case, in which the Tax Court proceeding had been pending more than six years when the State court action was instituted, the district director reasonably elected to continue the Tax Court litigation. The mere filing of the tax claim in the State court did not constitute an election to litigate the claim there; such filing was merely a protective step, and the State court did not pass upon the claim until its validity had been upheld by the Tax Court.

Since the tax claim was fully litigated before the Tax Court, whose decision was upheld by the court of appeals, there is no basis for any contention that the corporation did not have adequate opportunity to contest the claim. Moreover, the fact that the State court proceedings did not oust the Tax Court of ju-

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Court has allowed. *Cohen* held only that the injunction suit did not come within certain exceptions to the general prohibition upon suits to restrain the collection of taxes. Although those cases contain some general language suggesting that Congress intended the collection procedure in Section 6871 to supplant Tax Court litigation, the language must be read in the light of the circumstance involved, *i.e.*, the bankruptcy proceeding was initiated before any Tax Court suit had been filed. The cases do not suggest that in the present situation, where the bankruptcy proceeding was initiated long after a Tax Court action had been brought, the government's mere filing of a proof of claim in the bankruptcy proceeding ousted the Tax Court of jurisdiction.

risdiction eliminates the ground of petitioner's contention (Pet. 9) that the State court improperly relied upon the Tax Court's determination that the government had a valid claim against the corporation. The doctrines of *res judicata* and collateral estoppel, of course, fully apply to Tax Court decisions. *United States* v. *International Building Co.*, 345 U.S. 502; *Commissioner* v. *Sunnen*, 333 U.S. 591; *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620; *Bros, Inc.* v. *W. E. Grace Mfg. Co.*, 261 F. 2d 428, 433 (C.A. 5); *Stern* v. *Commissioner*, 215 F. 2d 701 (C.A. 3).

2. Petitioner also challenges (Pet. 11-17) the constitutionality of the Tax Court proceedings, on the ground that the corporation was unfairly discriminated against because, due to its allegedly financial inability to pay the tax and sue in a district court for a refund, it was denied the right, given to more affluent taxpayers, to litigate its case before an Article III court. Similar attacks upon the constitutionality of the Tax Court have recently been rejected by three courts of appeals and this Court has three times refused to review the question[3]—twice in cases brought by this very corporation or its representative.[4] As we set forth in our memoranda in opposition in those two cases,[5] the constitutional claim is without substance, and there is no greater reason to

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[3] *Amos* v. *Commissioner*, 360 F. 2d 358, 359 (C.A. 4); *Nash Miami Motors, Inc.* v. *Commissioner*, 358 F. 2d 636 (C.A. 5), certiorari denied, 385 U.S. 918; *Martin* v. *Commissioner*, 358 F. 2d 63, 64 (C.A. 7), certiorari denied, 385 U.S. 920; *Ginsberg* v. *Fulton*, 382 U.S. 805, denying motion for leave to file petition for a writ of mandamus challenging the constitutionality of the Tax Court.

[4] *Ginsberg* and *Nash Miami Motors, supra*, note 3.

[5] No. 251 Miscellaneous, 1965 Term, and No. 421, this Term.

review it here than there was in any of the other cases that the Court previously declined to review.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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